

**STATE OF TENNESSEE**

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Opinion No. 04-066

Constitutionality of HB 2627 Regarding Recognition of Same-Sex Civil Unions or Domestic Partnerships

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**QUESTIONS**

1. Does current state or federal law prevent the recognition of same-sex domestic partnerships or civil unions granted by another state or foreign jurisdiction?
2. Is HB 2627 necessary to prevent the recognition of same-sex domestic partnerships and civil unions in Tennessee?
3. Will HB 2627 preclude private employers from voluntarily extending employee benefits to partners of employees in same-sex relationships if they choose to do so, even if the private employer is affiliated, by written contract or verbal relationship, with a local or state governmental body?
4. Does HB 2627 violate any provision of Tennessee or federal constitutional law?

**OPINIONS**

1. Yes, to the extent that the civil union or domestic partnership is intended to be a contract providing the rights and privileges of marriage, current state law precludes legal recognition.
2. No, as noted above, current state law precludes recognition.
3. No, HB 2627 will not prevent private employers from voluntarily extending employee benefits to partners of employees in same-sex relationships.
4. No, HB 2627 is constitutionally defensible.

**ANALYSIS**

1. Under the provisions of HB 2627, Tenn. Code Ann. § 36-3-113 would be amended to provide that any civil union or domestic partnership between individuals of the same sex

recognized by another state or foreign jurisdiction shall be void and unenforceable in Tennessee. Currently, Tenn. Code Ann. § 36-1-113 explicitly provides that it is the public policy of the State to only recognize marriages between one man and one woman. As this statute specifically provides:

. . . the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.

Tenn. Code Ann. § 36-1-113(a).

Although the terms “civil union” and “domestic partnership” are not defined in HB 2627, it is assumed that these terms are being used as in other jurisdictions to mean a legal relationship between two persons of the same sex that grants the same rights, privileges and responsibilities of marriage. Other states with statutes allowing the establishment of civil unions or domestic partnerships between individuals of the same sex have expressly provided that the purpose of such civil union or domestic partnership is to give such individuals the same rights, protections and benefits as well as the same responsibilities, obligations and duties under law as are granted to and imposed upon spouses in a marriage. *See* 15 Vt. Stat. Ann. §§ 1201, 1204.; Cal. Fam. Code §297.5. As noted above, Tenn. Code Ann. § 36-1-113(a) specifically provides that the only legally recognized contract in Tennessee bestowing the unique and exclusive rights and privileges of marriage is one between a man and a woman. Accordingly, current state law precludes recognition of same-sex domestic partnerships or civil unions granted by another state or foreign jurisdiction for the purpose of bestowing the rights, benefits and privileges of marriage in Tennessee.

2. As Tenn. Code Ann. § 36-1-113 does not provide for recognition of any legal relationship between two individuals of the same-sex for the purpose of bestowing the same rights and privileges of marriage, HB 2627 is not necessary to prevent recognition of same-sex domestic partnerships and civil unions in Tennessee. There is precedent from another state for refusal to recognize same-sex domestic partnerships or civil unions granted by another state. In *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002), the Connecticut Appellate Court held that a foreign same-sex civil union was not a “marriage” under Connecticut law for purposes of obtaining rights and privileges provided by marriage. Thus, state courts with subject matter jurisdiction over matters affecting or involving dissolution of marriages lacked authority over an action seeking to dissolve a same-sex civil union. As Connecticut does not recognize the validity of same-sex marriages, the Court held that there was no *res* to address and dissolve. 71 Conn. App. at 380, 802 A.2d at 175.

3. Under HB 2627, partners of employees in same-sex relationships would not be entitled to benefits required to be provided to spouses under Tennessee law even if a domestic partnership or civil union has been granted by another state or a foreign jurisdiction. This does not preclude, however, private employers from voluntarily extending employee benefits to partners of employees in same-sex relationships, even if the private employer is affiliated, by written contract

or verbal relationship, with a local or state governmental body. While HB 2627 does not allow recognition of the right to receive benefits or privileges as a spouse based on a same-sex domestic partnership or civil union, it does not preclude the voluntary provision of benefits to partners of employees in same-sex relationships. The provisions of such benefits would not be based on any “marital” rights due to the foreign same-sex civil union or domestic partnership. Rather, such benefits would be provided pursuant to the benefits contract voluntarily agreed to by the private employer.

4. This office has previously opined that Tenn. Code Ann. § 36-1-113, prohibiting same-sex marriages in Tennessee, is constitutionally defensible. Op. Tenn. Att’y Gen. No. 96-016 (February 13, 1996). Based on the same reasoning, HB 2627 would also be constitutionally defensible.

Recent decisions from other states have upheld the constitutionality of similar legislation under the full faith and credit clause, equal protection clause and the right to privacy. *See Lewis v. Harris*, 2003 WL 23191114 (NJ Super. L., November 5, 2003) (upholding constitutionality of prohibition of same-sex civil marriages under right of privacy, equal protection and right to marry). The majority of states do not recognize same-sex marriages as a statutory or constitutional right. *Id.* *See also* 81 ALR 5th 1. Therefore, the prohibition of recognition of same-sex domestic partnerships or civil unions granted by another state or foreign jurisdiction for the purpose of bestowing the rights and privileges of marriage as provided in HB 2627 is constitutionally defensible.

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